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No.

IN THE
Supreme Court of the United States

October Term, 1996

GEORGE P. POLY AND MAUREEN S. POLY,
Petitioners,

v.

THOMAS E. CARGILL, JR. D/B/A
CARGILL ASSOCIATES AND MICHAEL T. MOYLAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When government officials wrongfully interfere with a parent's fundamental right to a relationship with his/her children, exacerbated by their failure to provide the parent with the procedural protections afforded by the Due Process Clause of the Fifth Amendment to the United States Constitution, does the discretionary function exception under the Federal Torts Claims Act immunize the government from liability for such wrongful interference?

PARTIES TO THE PROCEEDINGS

The Petitioners in this action, Plaintiffs below, are George P. Poly ("Poly") and his wife, Maureen S. Poly (collectively "Plaintiffs"), who sued Respondents, Defendants below, Thomas E. Cargill, d/b/a Cargill Associates ("Cargill") and Michael T. Moylan ("Moylan") (collectively "Defendants"), for legal malpractice.

The "underlying lawsuit" in the legal malpractice case was filed by Moylan on behalf of Poly against Poly's ex-wife, Janet C. Gillis ("J. Gillis"), and her second husband, Air Force Sergeant Earl G. Gillis ("Sgt. Gillis"), and jointly against the United States of America ("USA") under the Federal Torts Claims Act ("FTCA") for wrongful actions by various members of the United States Air Force ("USAF" and/or "government"), including Sgt. Gillis.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, George P. Poly and Maureen S. Poly, respectfully pray that a writ of certiorari issue to review the decision entered by the Supreme Judicial Court of the Commonwealth of Massachusetts on July 11, 1996.

OPINIONS AND PETITION FOR REHEARING BELOW

The denial of the Petition for Rehearing by the Supreme Judicial Court of the Commonwealth of Massachusetts ("SJC") on Sep-

tember 11, 1996, is attached as Appendix A. The Petition for Rehearing dated July 25, 1996, is attached as Appendix B. The Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts in *George Poly & another* v. *Michael T. Moylan & others*, 423 Mass. 141, 667 N.E.2d 250 (1996), is attached as Appendix C. The Ruling on Moylan's Motion for Judgment Notwithstanding the Verdicts ("Ruling") of the Superior Court of the Commonwealth of Massachusetts on July 23, 1994, Civil Action No. 91-2299, is attached as Appendix D.

JURISDICTION

On July 11, 1996, the SJC affirmed the Ruling of the Superior Court, dated 23 1994, with respect to Judgment NOV on the legal malpractice count. See Appendices C and D, respectively. On July 25, 1996, a Petition for Rehearing was timely filed and was denied on September 11, 1996. See Appendices B and A, respectively.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Poly's fundamental liberty interest as a natural parent to a parent-child relationship, which right is protected under the Due Process Clause of the Fifth Amendment to the Constitution:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 28 U.S.C. § 1346(b) and 28 U.S.C. §§2671 *et seq.*:

> Subject to the provisions of . . . 28 U.S.C. § 2671 *et seq.*, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1977);

> "Employee of the government" includes . . . members of the military. . . .;

> "Acting within the scope of his office or employment," in the case of a member of the military . . . means acting in line of duty.

28 U.S.C. § 2671 (1977);

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . .

28 U.S.C. § 2674 (1977);

> The provisions of the [FTCA] . . . shall not apply to —

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1977) (the discretionary function exception ("dfe"))

STATEMENT OF THE CASE

A. *Introduction*

This is a legal malpractice case with additional counts for misrepresentation and deceit, unfair or deceptive acts or practices and loss of consortium, brought by Plaintiffs against two lawyers, Defendants Cargill and Moylan.

The "underlying lawsuit" in this legal malpractice case was filed by Moylan on behalf of Poly against Poly's ex-wife, J. Gillis, and her second husband, Sgt. Gillis, and jointly against the USA under the FTCA for wrongful actions by various members of the USAF, including Sgt. Gillis, which violated Poly's constitutionally protected right to a relationship with his children ("1985 Complaint"). Specifically, the 1985 Complaint alleged that while acting within the scope of their employment, members of the USAF, including Sgt. Gillis, wrongfully assisted J. Gillis (not a member of the USAF), in taking and keeping Poly's two sons, Christopher M. Poly and Stephen G. Poly ("children"), from Poly in violation of his custodial rights.

In the malpractice case, Plaintiffs alleged, among other things, that Moylan's negligence both before and while he was employed by Cargill, resulted in the dismissal of the 1985 Complaint, and that Moylan did not tell Poly of the dismissal and misrepresented the status of the case to Poly for years.

After the trial of the malpractice case, the jury returned a verdict for Poly finding, in relevant part, that Moylan had committed legal malpractice in allowing the 1985 Complaint against the government and the Gillises to be dismissed,[1] that Moylan had knowingly misrepresented material facts to Poly in handling his case,[2] and, most importantly, that Poly would have won the case against the government and the Gillises but for Moylan's negligence.[3] The jury's verdict, together with interest, amounted to over $260,000.

B. *How The Federal Question Was Presented*

As early as Plaintiffs' Opposition to Defendants' Motions for Summary Judgment, and continuing throughout trial and

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[1] After filing the 1985 Complaint, Moylan did nothing in the case. When the government filed a Motion to Dismiss, arguing that all of the actions of the USAF took place in Germany, and thus, the USAF was immune from liability by the foreign country exception under the FTCA, Moylan never opposed the government's Motion by advancing available arguments, or amending the Complaint, to highlight the wrongful actions of the USAF in the United States. Not surprisingly, presented with an unopposed Motion, the Federal District Court dismissed the 1985 Complaint against the government, specifically noting on the Motion that "no opposition" had been submitted.

[2] Among other things, Moylan never discussed the government's Motion to Dismiss with Poly and unilaterally decided not to oppose it. For years, Moylan continually misrepresented the status of the case to Poly, who believed his case was still alive and pending until 1991.

[3] For reasons attributable to other errors by the trial judge, the jury found, in response to one narrowly framed question regarding Cargill's liability, that Moylan's employer did not have control over Moylan's work with respect to the underlying Poly case, and thus could not be held liable and, with respect to Poly's second wife, Maureen S. Poly, that she had suffered no loss of consortium.

on appeal to the SJC, Plaintiffs argued, both verbally and in writing, that the government was not immunized from liability by the dfe under the FTCA, where government officials' actions wrongfully interfered with Poly's constitutionally protected right to a parent-child relationship.

C. *Evidence Presented At Trial*

During the trial, evidence regarding the underlying lawsuit, which, given the jury verdict for Poly, must be taken in the light most favorable to Plaintiffs, was introduced, showing, among other things, that: (1) at a hearing on April 9, 1979, with Poly's ex-wife, J. Gillis, and her second husband, Sgt. Gillis, present, a Massachusetts probate court judge entered an order forbidding J. Gillis from removing Poly's children, ages 9 and 10, from the state ("restraining order"); (2) on April 12, 1996, J. Gillis wrote to Poly informing him of her intention to take the children out of the country to Sgt. Gillis's new duty station in violation of the restraining order; (3) on April 13, 1979, the probate court judge entered an order awarding custody of the children to Poly ("custody order"); (4) Poly immediately notified USAF officials of the custody order and by April 18, 1979, USAF officials had received copies of both court orders, putting the USAF on notice, both verbally and in writing, of Poly's parental rights; (5) on or about April 20, 1979, the USAF transferred Sgt. Gillis out of the United States to a new duty station in Germany; (6) during April, 1979, the USAF was also notified of the court orders and of Poly's parental rights by Poly's divorce attorney; (7) in April, 1979, Poly received no information from the USAF as to the specific whereabouts of his children or J. Gillis, as he questioned USAF authorities and searched frantically for his children; (8) in fact, in April, 1979, USAF officials told Poly that J. Gillis and the children were already out of the country and that there was noth-

ing the USAF could do for him; (9) from April, 1979 to June, 1979, however, J. Gillis and the children were still in the United States and, in preparation for their transportation overseas, the USAF examined the children medically and took their passport photographs; (10) in June, 1979, *two months* after having been put on notice of Poly's parental rights, the USAF transported J. Gillis (a civilian) and the two children (not dependents of Sgt. Gillis) out of the United States to join Sgt. Gillis in Germany;[4] (11) from April, 1979 to June, 1979, USAF officials did not investigate the matter and failed to afford Poly notice and a hearing before transporting J. Gillis and Poly's children out of the United States, effectively terminating Poly's parental rights;[5] (12) in 1980, the USAF was also notified that a criminal arrest warrant for kidnapping had been issued for J. Gillis; (13) the maximum duration of an overseas tour of duty for an enlisted man in the USAF is typically no more than three years; (14) in disregard of the typical overseas tour length, in 1983 *and* in 1985, acting in the United States, USAF officials granted Sgt. Gillis's two requests

[4] Poly was unaware of the USAF officials' wrongful assistance to his ex-wife in the United States during the period from April, 1979 to June, 1979. Poly did not learn of the delayed June, 1979 departure until August, 1984, through a letter to Poly from a Lt. Col. of the USAF. Until 1984, Poly believed that the USAF had sent J. Gillis and the children overseas before Poly first notified the USAF on April 13, 1979 of his parental rights. Prior to 1984, any action brought by Poly against the USAF could have been dismissed as barred by the foreign country exception under the FTCA, because, given the facts as Poly then understood them, Poly could not, at that time, have alleged wrongful actions of the USAF in the United States. Where it was not until 1984 that Poly discovered the 1979 wrongful actions of the USAF in the United States, Poly's 1985 Complaint was timely under the FTCA and was not subject to dismissal on statute of limitations grounds or under the foreign country exception to the FTCA. The jury so found.

[5] Since Sgt. Gillis was already at his duty station overseas in April, 1979, any need of the USAF to have an enlisted person at his assigned duty station had been accomplished. The USAF had no similar need with respect to J. Gillis and the children which would justify ignoring the court orders and transporting J. Gillis and the children overseas two months later in June, 1979, severing Poly's parental relationship with his children, especially without affording Poly notice and an opportunity to be heard.

to extend his tour of duty outside of the United States, thereby facilitating J. Gillis's keeping Poly's children out of the United States for over eight years;[6] (15) after Sgt. Gillis, J. Gillis and the children, ages 17 and 18, were finally returned to the United States in the summer of 1987, J. Gillis was found guilty of parental kidnapping and held in contempt of the probate court orders she had violated; and (16) by the time of the legal malpractice trial in 1994, Poly had managed to rekindle a relationship with his older son, Christopher, but still had no relationship with his younger son, Stephen.

At trial, Plaintiffs' military expert, a West Point graduate and a retired Lieutenant General in the USAF, with thirty-five years of experience both as an officer and as a commanding officer, testified that the USAF officials' actions in this case were wrong, were not in the best interests of the country or the USAF, and were not in furtherance of any USAF policies. He testified further that, under the circumstances, as a reasonable USAF official, he would have stopped the transfer of the children and J. Gillis.

Defendants' expert, a former political appointee in the office of the Secretary of Defense, who was not a USAF officer with command experience, and who was *not* in the USAF in 1979, testified that the mandatory policy of the USAF in 1979 was not to get involved with, or take sides in, custody disputes, *i.e.*, to remain neutral. Plaintiffs' military expert testified that, in wrongfully assisting J. Gillis, the USAF officials did not remain neutral and, clearly, would not have been following the mandates of such a policy.

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[6] In April, 1984, Poly first learned that the USAF, acting in the United States, had approved a tour extension for Sgt. Gillis. In the face of increasing pressure from congressmen, law enforcement officials, and the media, among others, the USAF promised to return the Gillises to the United States in 1985. Nevertheless, in 1985, USAF officials at Headquarters in San Antonio, Texas, again approved Sgt. Gillis's request to extend his tour overseas.

No evidence was ever introduced by Defendants to show that, under the circumstances, the USAF officials had discretion to ignore the restraining order and custody order and to transfer the children out of the United States.

D. *Verdict For Poly And Post-Trial Proceedings In The Trial Court*

On February 3, 1994, the jury in the legal malpractice case returned the verdict for Poly. Thereafter, Moylan filed a Motion for Judgment Notwithstanding the Verdict ("NOV"), which Plaintiffs opposed. On July 23, 1994, just before retiring, the trial judge allowed the Motion for Judgment NOV on the negligence count, thereby taking away Poly's favorable jury verdict.[7] The trial judge ruled that Moylan could not be held liable for malpractice because the underlying case against the USAF was unwinnable. In his ruling, the trial judge found that the actions of USAF officials were discretionary functions exempt from liability under the FTCA and that the USAF was merely carrying out the "neutrality policy" which was, as the trial judge viewed the evidence, the official USAF policy with respect to custody matters. See Appendix D.

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[7] The trial judge also substantially reduced the jury's damages award on the count for deceit from $10,000 to only a few hundred dollars, and awarded both Defendant lawyers their costs. Further, despite the evidence from which the jury found Moylan had made misrepresentations and had deceived Poly, by denying Plaintiffs' Motion for a New Trial on the Ch. 93A count, the trial judge, who was openly biased in favor of Defendants throughout the trial, reaffirmed his earlier finding that both Defendants did not violate the chapter of the Massachusetts General Laws which proscribes unfair or deceptive acts or practices (M.G.L., Ch. 93A).

The trial judge who heard all of the evidence, and who took away Poly's jury verdict, retired before Plaintiffs' could be heard on a Motion for a New Trial on the malpractice count and the misrepresentation and deceit count. Not surprisingly, another Superior Court judge, unfamiliar with the trial and the case, denied Plaintiffs' Motion for a New Trial.

E. *Appeal Of Judgment NOV To The SJC*

On July 10, 1995, Plaintiffs filed an Application for Direct Appellate Review ("Application") to the SJC, alleging, among other things, that (1) the trial judge erred in allowing Judgment NOV, (2) the trial judge erred in ruling that the USAF would not have been liable in the underlying case for wrongfully interfering with Poly's constitutionally protected liberty interest in maintaining a relationship with his children, and (3) the trial judge's biased conduct violated plaintiffs' right to a fair and impartial trial.[8] The SJC granted Plaintiffs' Application.

One year later, on July 11, 1996, the SJC affirmed the trial judge's rulings that Cargill and Moylan had done nothing wrong and found that the dfe immunized the government from liability in the underlying case[9] and, thus, neither lawyer could be found liable for malpractice.[10] See Appendix C.

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[8] The trial judge's egregious conduct itself, which deprived Plaintiffs' of their constitutional right to a fair and impartial trial, raises a separate question of denial of due process. M.G.L. Const. pt. 1, art. XXIX; U.S. Const. amend. XIV, § 1.

[9] Given the mandatory aspect of the so-called "neutrality policy" which would not support a finding that USAF officials had discretion to wrongfully interfere with Poly's custodial rights, the SJC chose to disregard its significance in a footnote, even though the "neutrality policy" was the linchpin of the Defendant's dfe argument and the centerpiece of the trial judge's erroneous decision.

[10] Associate Justice Neil L. Lynch wrote the SJC decision in this case, which, despite the jury's verdict finding that Moylan, while working for Cargill, had willfully and knowingly deceived Poly, also held that the trial judge was warranted in ruling that neither Moylan nor Cargill had committed any unfair or deceptive act or practice. Ironically, Judge Lynch is the *same* judge who disbarred Moylan in 1995 for negligent, unethical, and fraudulent actions in another case Moylan had handled during the same time frame he was representing Poly, which actions in that other case are remarkably similar, if not identical, to the negligent, unethical, and fraudulent actions of Moylan that Plaintiffs proved to the jury at trial. The effect on this case of Cargill's prominence as a well known trial lawyer with a career spanning over forty years as a member of the Massachusetts Bar, is not fully known. What is known, and what is obvious from the trial transcript, is the bias and partiality of the trial judge throughout the trial in favor of the Defendants, especially Cargill.

On July 25, 1996, Plaintiffs filed a Petition for Rehearing. See Appendix B. Plaintiffs argued, among other things, that the SJC had "overlooked and misapprehended" several key facts and points of law regarding the government officials' actions, Poly's constitutionally protected right to a relationship with his children, and the FTCA. Plaintiffs *again* asserted that, (1) taking all the facts in the light most favorable to Plaintiffs, the jury in *Poly* was warranted in finding that the conduct of USAF officials in the United States was negligent and/or wrongful under the FTCA, and (2) by ignoring the probate court orders, USAF officials in the United States had wrongfully aided a civilian in the parental kidnapping of Poly's two children and had facilitated the intentional interference with a father's fundamental and constitutionally protected right to a relationship with his children for over eight years.

On September 11, 1996, the SJC denied Plaintiffs' Petition or Rehearing. See Appendix A.

REASONS FOR GRANTING THE PETITION

I. WHERE THE DECISION OF THE HIGHEST COURT IN MASSACHUSETTS HOLDS THAT THE DISCRETIONARY FUNCTION EXCEPTION UNDER THE FEDERAL TORTS CLAIMS ACT IMMUNIZES THE GOVERNMENT FROM LIABILITY FOR WRONGFULLY INTERFERING WITH A PARENT'S FUNDAMENTAL LIBERTY INTEREST IN MAINTAINING A RELATIONSHIP WITH HIS CHILDREN, AND FOR ABRIDGING THE PARENT'S CONSTITUTIONAL RIGHTS BY FAILING TO PROVIDE HIM WITH NOTICE AND AN OPPORTUNITY TO BE HEARD AS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, THAT DECISION MUST BE REVERSED.

A. *The SJC's Opinion Is In Direct Conflict With Decisions Of The Supreme Court Of The United States And Other Circuit Courts Of Appeals.*

The Supreme Court of the United States has held that government officials' conduct, even if discretionary, will *not* be shielded from liability by qualified immunity, if that conduct violates clearly established constitutional rights of which a reasonable person would have, or should have, known, *i.e.*, the contours of that right are sufficiently clear that a reasonable official would understand that his actions will violate the constitutional right. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Similarly, circuit courts of appeals have held that government officials' conduct cannot be discretionary if it violates the Constitution, because government officials do not possess discretion to violate constitutional rights. *See Pooler* v. *United States*, 787 F.2d 868, 871 (3d Cir.), *cert denied*, 479 U.S. 849 (1986)("*Pooler*"); *see also United States Fidelity & Guaranty Co.* v. *United States*, 837 F. 2d 116, 120 (3d Cir.), *cert denied*, 487 U.S. 1235 (1988).

In April, 1979, Poly's right as a parent to a relationship with his children, was a clearly established fundamental liberty interest, protected as a matter of due process under the Constitution. *See, e.g., Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978)(significant substantive due process interest of divorced father to relationship with his child)("*Quilloin*"); *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977)("*Moore*"); *Stanley* v. *Illinois*, 405 U.S. 645, 651-52 (1972)(father of an illegitimate child, with whom he had a custodial relationship, had a substantive due process interest which could not be terminated without a hearing)("*Stanley*"); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944)("*Prince*"); *Meyer* v. *Nebraska*, 262 U.S. 390, 399-400 (1923)("*Meyer*").[11]

Furthermore, in April, 1979, the contours of Poly's parental rights, as framed by the probate court orders, were made sufficiently clear to USAF officials, as soon as they were put on notice of the court restraining order and court custody order.

Under the circumstances, reasonable government officials would have understood that their actions, which aided Poly's ex-wife in removing Poly's children from the United States in violation of the probate court orders, effectively severing Poly's relationship with his children, were actions which wrongfully interfered with Poly's constitutionally protected parental right, exacerbated by their failure to provide Poly with notice and an opportunity to be heard.[12] At trial, Plaintiffs' USAF expert testified that the USAF officials' actions in this case were wrong, were not in the best interests of the country or the USAF, and were not in furtherance of any USAF policies,[13] and that,

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[11] *See also*, Restatement (Second) of Torts § 700 (1977)(tort of intentional interference with the parent-child relationship).

[12] *See also*, Restatement (Second) of Torts §876 (a) and (b) (1979)(all those who cooperate, lend assistance or encourage a wrongdoer in the commission of a tortious act, *i.e.*, aid and abet, are equally liable.

[13] If a mandatory "neutrality policy" directed USAF officials not to intervene in custody "disputes" and not to take any action which would assist either party to such

under the circumstances, as a reasonable USAF official, he would have stopped the transfer of the children and J. Gillis.

Where, in addition to knowledge of the court orders, the USAF was on notice of a criminal arrest warrant for the ex-wife for the kidnapping of Poly's children, deliberate actions of the USAF which facilitated J. Gillis remaining out of the United States with Poly's children for eight years, demonstrated an arrogant disregard for Poly's rights, including his constitutionally protected right to a relationship with his children.

Thus, given Poly's clearly established constitutionally protected parental rights, the discretionary function exception to a waiver of governmental immunity in this case was not a valid defense to Poly's claims, nor was it a valid ground upon which to base any decision to take away Poly's jury verdict.

Whether the dfe applies to immunize governmental actors who aid in the intentional interference with the constitutionally protected right of a parent to a relationship with his/her children is not unmapped territory. *See, e.g., Prisco* v. *Talty*, 993 F.2d. 21, 26 n. 14 (3rd Cir. 1993)(in a legal malpractice case with the underlying case involving similar governmental wrongdoing which violated a parent's constitutionally protected parental rights, the discretionary function exception was held not to be a defense to the father's FTCA claim) *citing Prisco* v. *United States Dept. of Justice*, 851 F.2d 93, 96-98 (3d Cir. 1988), *cert denied*, 490 U.S. 1089 (1989)(government is liable for conduct which violated father's clearly established constitutional due process rights, where both the father's substantive

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"disputes", after being put on notice of Poly's parental rights, clearly, by wrongfully aiding J. Gillis, the USAF violated its own policy. *Berkovitz* v. *United States*, 486 U.S. 531 (1988)(an agency's violation of its own mandatory regulations is not a discretionary act). Furthermore, in following a mandatory policy, the government must exercise due care and, in this case, the USAF failed to exercise due care. *See Grigalauskas* v. *United States*, 103 F. Supp. 543 (D.Mass.), *aff'd* 195 F.2d 494 (1st Cir. 1951). The SJC avoided analysis of the neutrality policy by relegating its significance to a footnote.

liberty interest and his procedural entitlement to notice and an opportunity to be heard were implicated when his daughter was placed in the witness protection program)("*Prisco*"); *Ruffalo* v. *Civiletti*, 702 F. 2d 710, (8th Cir. 1983), *on remand*, 565 F. Supp. 34 (W.D. Mo. 1983), *later proceeding sub. nom.*, *Ruffalo* v. *United States*, 590 F. Supp. 706 (W.D.Mo. 1984)(where a non-relocated parent is entitled to notice and a hearing in connection with the child's placement in the witness protection program, the government is liable for failing to provide the parent procedural due process)("*Ruffalo*"); *Franz* v. *United States*, 707 F. 2d. 582 (D.C. 1983), *supp. op.*, 712 F.2d 1428 (D.C. Cir. 1983), *on remand*, 591 F. Supp. 374 (D.D.C. 1984)(where a non-custodial parent has a constitutional right to notice and an opportunity to be heard when his child is placed in the witness protection program, and the government, in failing to afford the parent notice and a hearing, violated that right, the government is not immune from liability) ("*Franz*"); and *Salmeron* v. *United States*, 724 F.2d 1357 (9th Cir. 1983)(government could not avoid any potential liability for relocation of children under witness protection program, where government was capable of complying with state court order awarding custody of children to father, and without the government's continuing aid, there was considerable doubt that mother could have continued to frustrate father's attempts to locate and recover his children)("*Salmeron*").

Where the decision of the highest court in Massachusetts holds that the discretionary function exception under the FTCA immunizes government officials from liability for wrongfully interfering with a parent's fundamental liberty interest in maintaining a relationship with his children, and for abridging the parent's constitutional rights by failing to provide the parent with notice and an opportunity to be heard as required by the Due Process Clause of the Fifth Amendment, the SJC's decision is clearly in direct conflict with decisions of this Court and other circuit courts of appeals, and must be reversed.

B. *A Definitive Pronouncement By The Supreme Court Of The United States On The Question Presented Is Important To All Parents.*

The federal cases which deal with the federal witness protection program, *e.g.*, *Prisco*, *Ruffalo*, *Franz*, and *Salmeron*, show that even where the lives of the children and other participants in the witness protection program may be at stake, when the government, even if exercising discretion under the program, aids in the interference with the fundamental liberty interest of a non-relocating parent to a relationship with his/her children, the discretionary function exception does not immunize the government from liability for such interference. Certainly, with no one's life at stake in *Poly*, and given that the USAF officials were not acting under the strict confines of any program comparable to the witness protection program, the USAF officials' actions in aiding in the severance of Poly's relationship with his children, especially without affording Poly due process, cannot be justified or immune under any view of these facts and the law.

The SJC's erroneous opinion, using the dfe to excuse governmental action which wrongfully interferes with and abridges a parent's constitutional rights, is evidence of the need for a definitive pronouncement by this Court that when government officials wrongfully interfere with a parent's fundamental liberty interest in maintaining a relationship with his/her children and fail to provide a parent with the procedural protections afforded by the Due Process Clause of the Fifth Amendment to the United States Constitution, the dfe does not immunize those government officials from liability for such wrongful conduct.

C. *The SJC's Opinion Unjustifiably Ignores And Omits Material Facts And Relevant Law And Is So Shockingly Errone-*

ous And Devoid Of Evidentiary Support That It Must Be Reversed As A Gross Miscarriage Of Justice.

Plaintiffs' principal theory in *Poly* was that, by ignoring the court restraining order and court custody order, the government wrongfully aided a civilian in parental kidnapping and facilitated the intentionally interference with the constitutionally protected right of a father to a relationship with his children. In affirming the trial judge's rulings in favor of the negligent attorneys, taking away the jury verdict for Poly, nowhere in the *Poly* decision does the SJC articulate, let alone focus upon, Plaintiffs' theory.

In its decision, the SJC unjustifiably ignores and omits material facts and relevant law. For example, the SJC omits from its recitation of the facts the wrongful actions of the USAF officials from April, 1979 to June, 1979, which actions were the cornerstone of Plaintiffs' theory. Instead, the SJC opinion focuses on the limited issue of whether the USAF was obligated, or merely permitted, to *return enlisted personnel* from overseas, because of court orders or criminal warrants, or deliver them, on request, to civil authorities for trial. The SJC concludes that the governing regulations on that limited issue were "permissive" and therefore, USAF officials had discretion in deciding to return enlisted personnel and their decision not to return Sgt. Gillis from overseas was thus protected by the dfe. After absolving the USAF officials for the discretionary act of refusing to return Sgt. Gillis from overseas, in a sentence the SJC characterizes the "initial act of permitting Sgt. Gillis to leave this country with his wife's children" as an "operational decision." The SJC then implies that all operational decisions are included within the dfe, and thus, the USAF officials' decision to send the children overseas was also protected by the dfe. See Appendix C. *But see United States* v. *Gaubert,* 499 U.S. 315, 336-39 (1991)(Scalia, J., concurring in part and concurring in the judgment).

The SJC's decision misapprehends the offending conduct and distorts the USAF wrongdoing on which Poly based liabil-

ity. First, the children did not leave the country with Sgt. Gillis in April, 1979, but left with J. Gillis in June, 1979, and, by June 1979, the USAF already had been put on notice of Poly's constitutionally protected parental rights. Second, J. Gillis and the two boys were not enlisted personnel. Third, the primary allegation of negligence was *aiding J. Gillis and sending J. Gillis and the children* overseas in total disregard of the court orders. Although Plaintiffs argued that the USAF also acted negligently and wrongfully in the United States by twice approving Sgt. Gillis's request to extend his tour of duty overseas, thus facilitating J. Gillis wrongfully remaining overseas with the children for eight years, Plaintiffs never argued that the USAF had to interrupt Sgt. Gillis normal tour (which should have been only 3 years) and return Sgt. Gillis to civil authorities in the United States for trial. Fourth, the USAF failed to afford Poly notice and an opportunity to be heard in violation of his constitutional parental rights. Fifth, Plaintiffs' USAF military expert, testified that the USAF officials' actions in this case were wrong, were not in the best interests of the country or the USAF, and were not in furtherance of any USAF policies.

Omitting such critical facts or presenting them in a non-chronological fashion, the SJC's opinion tends to camouflage the wrongful conduct of the government, does not explain how those actions of the USAF officials could be immune from liability by the dfe under the FTCA, and avoids having to harmonize its decision with the rationale in the decisions of federal cases, such as *Quilloin*, *Moore*, *Stanley*, *Prince*, *Meyer*, *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982) (infringement of parent-child relationship implicates substantive due process), *Prisco*, *Ruffalo*, *Franz*, *Salmeron*, and *Pooler* ("federal cases"). The SJC does *not* mention or cite any of these federal cases in its decision.

No evidence was ever introduced by Defendants to show that, under the circumstances, the USAF officials had discretion

to ignore the restraining order and custody order and to transfer the children out of the United States.

Furthermore, even if the government officials' actions are discretionary, to be protected by the dfe, those actions must be in furtherance of a public policy. *Berkovitz* v. *United States*, 486 U.S. 531, 536-37 (1988). No evidence was ever introduced by Defendants of any statute, regulation, internal guideline, or policy, and the SJC cited to none, which was furthered by the USAF officials' conduct, or which authorized or condoned the USAF officials' decisions to: (1) ignore court orders; (2) facilitate parental kidnapping by sending a civilian overseas with two children who, pursuant to the court orders, belonged in the custody of their father; and (3) aid and abet in the intentional interference with the constitutionally protected right of a father to a relationship with his children.

To justify reliance on the dfe, in its opinion, the SJC improperly interprets and applies *United States* v. *Gaubert*, 499 U.S. 315 (1991). In quoting *Gaubert*, the SJC omits from the selected quotation the essence of the message that governmental "actions must be the kind of conduct that can be said to be grounded in the policy of the regulatory regime", *i.e.*, the actions must be in furtherance of the policy that the government seeks to accomplish. *Id.* at 325 and n.7. Where USAF officials, who are sworn to uphold the Constitution of the United States, ignored state court orders, aided in parental kidnapping, and, without providing due process safeguards, effectively terminated a parent's constitutionally protected right to a relationship with his children, it would have been irrational for the SJC to posit that the USAF officials' actions were in furtherance of any policy. Thus, the SJC's omission of the heart of the *Gaubert* quotation was purposeful and thus, demoralizing. Fully quoted or partially quoted, *Gaubert* does not stand for the proposition that government officials have discretion to violate constitutional rights.

The SJC's decision implicitly condones actions by government officials which show contempt for court orders and which result in the abridgment of a parent's constitutional rights; actions which are hardly in furtherance of any policy or in the best interest of the country. In light of the law of this Court and other circuit courts of appeals,[14] given the USAF officials' wrongful actions proscribed under the FTCA, and Poly's fundamental right to a relationship with his children protected by the Due Process Clause of the Fifth Amendment to the United States Constitution, the SJC's decision is so shockingly erroneous and devoid of evidentiary support, that it must be reversed as a gross miscarriage of justice.

CONCLUSION

Petitioners pray that certiorari should issue.

Respectfully submitted,

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SCOTT A. BELL
Counsel for Petitioners
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Date: December 10, 1996

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[14] Ironically, the SJC's opinion in *Poly* is also inconsistent with its own decisions. *See, e.g., Adoption of Eugene*, 415 Mass. 431, 435, 614 N.E.2d 645, 647 (1993)(parents have a constitutionally protected interest in maintaining a relationship with their children); *Murphy* v. *I.S.K. Con of New England, Inc.*, 409 Mass 842, 859-63, 571 N.E. 2d 340, 351-52 (1991)(the tort of intentional interference with the parent-child relationship is a contemporary expression of common law actions involving interference with parental rights, which actions have been around for over a century); *Harry Stoller & Co.* v. *City of Lowell*, 412 Mass. 139, 587 N.E. 2d 780 (1992)(dfe explained); *Horta* v. *Sullivan*, 418 Mass. 615, 638 N.E.2d 33 (1994) (dfe explained).

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APPENDIX A

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Ronald I. Bell, Esquire
Bernstein & Bell
4 Courthouse Lane
Chelmsford, MA 01824

RE: No. SJC-07009

GEORGE POLY & another
vs.
MICHAEL T. MOYLAN & others

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above-captioned case has been considered by the court and is denied.

Very truly yours,

/s/_____
Jean M. Kennett, Clerk

Dated: September 11, 1996

To: Ronald I. Bell, Esquire
Laurence Field, Esquire
Allen N. David, Esquire
Essex Superior Court Dept.

APPENDIX B

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EUGENE D. BERNSTEIN, J.D.
RONALD I. BELL, J.D., LL. M.
SCOTT A. BELL, J.D.

July 25, 1996

Honorable Chief Justice Paul J. Liacos
Supreme Judicial Court
Pemberton Sq.
Boston, MA 02108

Re: PETITION FOR REHEARING
George P. Poly and another v. Michael T. Moylan, et al.[1]
Supreme Judicial Court Docket No. SJC-07009

Dear Chief Justice Liacos:

Plaintiffs George P. Poly ("Poly") and Maureen S. Poly (collectively "Plaintiffs"), submit their Petition for a Rehearing in the above-referenced case.

A. Introduction:

Where the jury found that the actions of a negligent lawyer ("Moylan") (previously disciplined and now disbarred) caused a father to lose his claim against the government for aiding in the intentional interference with the father's constitutionally pro-

[1] George P. Poly and Maureen S. Poly v. Thomas E. Cargill, Jr. d/b/a Cargill Associates and Michael T. Moylan.

tected right to a relationship with his children, which claim the jury also found was winnable; and the jury further found that, throughout his representation, the negligent lawyer willfully and intentionally lied to the father, one would expect that the opinion by the Supreme Judicial Court ("SJC"), which upheld a judgment (NOV) absolving the lawyer from liability and stripping the father of his jury victory, would be comprehensive, particularly well reasoned and consistent with relevant case law. However, the opinion, which reaches such a harsh result, is seriously flawed both factually and legally. Justice has not been done.

B. Facts which the SJC has overlooked or misapprehended:
The SJC has omitted, overlooked, or misapprehended several key facts.
Some of these key facts are restated here in the light most favorable to the Plaintiffs:

1. Actions of USAF

a. On April 9, 1979, with Sgt. Gillis present, Janet Gillis ("J. Gillis") told a probate court judge that she was not planning to take the children from their home in Lee, NH. The judge entered a restraining order to that effect;

b. On April 11, 1979, J. Gillis took the children out of NH, but not out of the United States;

c. On April 13, 1979, when the judge was informed that J. Gillis had ignored the restraining order and, in essence, had previously lied to the probate court, the judge immediately entered a temporary order awarding Poly custody of the children, which order the judge reaffirmed 4 days later;

d. In April 1979, Poly and his divorce attorney, at the time, notified the USAF of the restraining order and the custody order;

e. From April, 1979 to June, 1979, the USAF did not investigate the probate court orders, but instead ignored them

and continued to aid J. Gillis and prepare her and the children for transportation out of the country;

f. In June, 1979, *two (2) months after being put on notice of the restraining order and the custody order*, the USAF transported J. Gillis, a civilian, and the two children, *not* dependents of Sgt. Gillis, out of the United States to join Sgt. Gillis in Germany. Contrary to the SJC's opinion, neither J. Gillis nor the children left the country with Sgt. Gillis, who had left for Germany on or about April 20, 1979. Exhibit #18;

g. United States Congressmen and Senators, District Attorneys, media personnel, and others, including the FBI, were involved in attempting to help Plaintiff get his children back. *See, e.g.*, exhibits #13, 14, 15, 16, 17, 19, 20, 46, and 50; and

h. The maximum length of an overseas tour of duty is no more than three years, however, the USAF, acting in the United States, purposely granted Sgt. Gillis two requests to extend his tour of duty outside of the United States for over eight years.

In summary, taking all the facts in the light most favorable to Plaintiffs, the *Poly* jury was warranted in finding that the conduct of the USAF in the United States was negligent and/or wrongful under the FTCA. By ignoring the probate court orders, the USAF in the United States had aided a civilian in the parental kidnapping of two children and had facilitated the intentional interference with a father's constitutionally protected right to a relationship with his children for over 8 years.

The SJC omits the facts regarding the USAF's actions from April, 1979 to June, 1979, which actions are the cornerstone of Plaintiffs' argument. Omitting such critical facts or presenting them in a non-chronological fashion, the opinion tends to camouflage the wrongful conduct of the government, does not explain how those actions could be justified or immune under the discretionary function exception ("DFE"), and avoids having to harmonize its decision with the rationale in the deci-

sions of federal cases, such as *Franz* v. *United States*, 707 F.2d 582 (D.C. 1983) ("*Franz*"); *Salmeron* v. *United States*, 724 F.2d 1357 (9th Cir. 1983); and *Ruffalo* v. *United States*, 590 F.Supp. 706 (W.D.Mo. 1984) ("*Ruffalo*"). Those federal cases dealt with the DFE and the intentional interference with a parent's constitutionally protected rights, and found the government liable for far less than the negligent and/or wrongful conduct of the USAF in *Poly. Prisco* v. *Talty*, 993 F.2d 21, 26 n.14 (3rd Cir. 1993).

2. Actions of Moylan

The SJC's opinion also does not adequately convey the depths of Moylan's negligence and unethical conduct. Some key facts are restated here in the light most favorable to Plaintiffs. Moylan did not:

a. execute a contingent fee agreement in compliance with S.J.C. Rule 3:05;

b. initially set forth existing facts in the administrative claim which he presented to the USAF which would support recovery under the FTCA, and did not later redraft the Complaint to highlight actions of the USAF in the United States to address the shortcomings which the USAF had identified as lacking in his administrative presentment:

c. bring a claim for loss of consortium and failed to indicate to Plaintiffs that they had such a claim;

d. in any way, oppose the USA's Motion to Dismiss the 1985 Complaint;

e. advance available legal alternatives under Rule 4 F.R.C.P. regarding service on the Gillises to prevent total dismissal of the 1985 Complaint, thereby creating a subsequent statute of limitations problem with a complaint he later filed in 1988;

f. move to vacate dismissal when he received evidence that the Gillises had been served prior to the 1985 Complaint being dismissed against them;

g. after filing Complaints against the USAF in 1985 and 1988, conduct any discovery in either of Poly's cases;

h. in conformance with his usual practice, keep Poly informed of ongoing developments and, throughout his representation, when he did respond to Poly's inquiries, Moylan falsely replied to Poly about the status and progress of Poly's cases; and

i. Furthermore, over the objection and Affidavit of Poly, the remainder of the 1988 case was dismissed for lack of prosecution in August 1992, four (4) months after Moylan was forced to withdraw as Poly's counsel because of the malpractice lawsuit.

The *Poly* jury was warranted in finding that Moylan was negligent and that he had willfully and knowingly misrepresented and deceived Poly.

C. Points of law which the SJC has overlooked or misapprehended:

In its discussion of the law, the SJC overlooks or misapprehends several key legal propositions which are important to an accurate analysis of the case.

1. The case against the USAF and the discretionary function exception.

Given the obvious negligent or wrongful conduct of the USAF and the negligent acts or omissions of the defendant attorney, the SJC's reliance upon the DFE to absolve the USAF and the negligent lawyer from liability in *Poly*, is inconsistent with, and not supported by, the SJC's reasoning in *Harry Stoller & Co.* v. *City of Lowell*, 412 Mass. 139, 587 N.E.2d 780 (1992) ("*Stoller*") and *Horta* v. *Sullivan*, 418 Mass. 615, 638 N.E.2d 33 (1994) ("*Horta*"), and the reasoning in relevant federal case law. It is impossible to reconcile the different results.

First, in discussing the DFE, it is important to identify the allegedly negligent conduct of the USAF on which Poly bases

liability, because it is that conduct that must have included the DFE. Plaintiffs' principal theory in *Poly* was that, by ignoring valid state court orders, the government aided a civilian in parental kidnapping and facilitated the intentional interference with the constitutionally protected right of a father to a relationship with his children. *Murphy* v. *I.S.K. Con of New England, Inc.*, 409 Mass. 842, 571 N.E.2d 340 (1991). Nowhere, however, in the *Poly* opinion, does the SJC articulate, let alone focus on, Plaintiffs' theory.

There was no statute, regulation, internal guideline, or policy, and the SJC has cited to none, which was furthered by the USAF's conduct, or which authorized or condoned the USAF (1) ignoring valid court orders, (2) facilitating parental kidnapping by sending a civilian overseas with two children who pursuant to court orders, belonged in the custody of their father, and (3) aiding and abetting in the intentional interference with the constitutionally protected right of a father to a relationship with his children. Defendants had argued that the USAF conduct in June of 1979 was controlled by the neutrality policy and the trial judge agreed. If the neutrality policy did control in 1979, the DFE would play no role because USAF officials would have had to follow that policy and they obviously did not. Although the neutrality policy was the linchpin of the Defendants' discretionary function defense and the centerpiece of the trial judge's erroneous decision, the SJC's opinion bypasses its significance in a footnote.

Instead, the SJC focuses on the limited issue of whether the USAF was obligated, or merely permitted, to *return enlisted personnel* from overseas, because of court orders or criminal warrants, or deliver them, on request, to civil authorities for trial. The SJC concludes that the governing regulations on that limited and irrelevant issue were "permissive" and therefore USAF officials had discretion in deciding whether to return enlisted personnel. According to the SJC, since deciding to

return enlisted personnel from overseas is a discretionary decision and all discretionary decisions are to be made in the best interest of the United States and the USAF, the decision of the USAF officials not to return Sgt. Gillis from overseas was grounded in the policy of acting in the best interest of the United States and the USAF, and is protected under the DFE.

The SJC has misapprehended the offending conduct. J. Gillis and the two boys were not enlisted personnel and the primary allegation of negligence was *sending* J. Gillis with the children overseas in the first place in total disregard of the probate court orders. Although Plaintiff argued that the USAF also acted negligently or wrongfully in the United States by twice approving Sgt. Gillis' requests to extend his tour of duty overseas, and thus facilitated J. Gillis in wrongfully remaining overseas with the children for over eight years, Plaintiffs never argued that the USAF had to interrupt Sgt. Gillis' normal tour and return Sgt. Gillis to civil authorities for trial. Plaintiff probably could not have cared less if the USAF had sent Sgt. Gillis into space and kept him there until he retired. The issue of interrupting Sgt. Gillis' normal tour and returning Sgt. Gillis to civil authorities for trial was not Plaintiffs' case and it is improper to suggest that it was.

Having absolved the USAF for the discretionary act of refusing to return Sgt. Gillis from overseas, in one brief sentence the SJC characterizes the "initial act of permitting Sgt. Gillis to leave this country with his wife's children" as an "operational decision." The SJC then implies that *all* operational decisions are included within the DFE, and therefore, the USAF also had discretion to ignore the court orders and send J. Gillis and the children to Germany. *But see Burns* v. *United States*, 618 F.Supp. 882, 883-84 (D.C. Mass. 1985).

This distorts the USAF's wrongdoing, because the children did not leave the country with Sgt. Gillis in April, 1979. They left the country with civilian J. Gillis two months later, in June,

1979. Exhibit #18. And, whether it is proper to refer to the children as "his wife's children" or "George Poly's children," the facts are that by a Massachusetts probate court order, of which the USAF was on notice, the children belonged in the custody of their father.

When in June of 1979, USAF officials negligently or wrongfully decided to ignore valid court orders and send J. Gillis out of the United States thereby aiding a civilian in parental kidnapping and facilitating the intentional interference with a constitutionally protected right of a father to a relationship with his children, the USAF officials' decision, even if arguably "operational," was ministerial in nature and involved no social, political, or economic policy considerations. USAF officials were not making choices with respect to public policy and planning, but rather their decision was an ad hoc decision based on the situation confronting them. *Horta*, 418 Mass. at 621; *Alake* v. *City of Boston*, Mass. App. Ct. Docket No. 94-P-747, Lawyers Weekly No. 11-130-96 (July 8, 1996).

Certainly there was no evidence offered by Defendants that any USAF official said "let me see if I ignore these court orders and send this civilian overseas with these 2 children who, the court has determined, belong in the custody of their father, I'm acting in the best interest of the country and the USAF"! Even the Court in *United States* v. *Gaubert*, 499 U.S. 315, 324-25 (1991), points out that to be immunized, governmental "actions must be the kind of conduct that can be said to be grounded in the policy of the regulatory regime," *i.e.*, based on the purposes that the regulatory regime seeks to accomplish. *Id.* at 325 and n.7. Can the SJC seriously state that the conduct of the USAF was the kind of conduct which furthered the best interest of the country and the USAF? The USAF was helping take away a constitutionally protected right which it is sworn to protect. It is difficult to imagine USAF officials, who are sworn to uphold the Constitution, justifying

their decision to ignore court orders which facilitates the deprivation of a constitutionally protected right, on any policy grounds. *See Alter* v. *City of Newton*, 35 Mass. App. Ct. 142, 145, 617 N.E.2d 656, 659 (Mass. App. Ct. 1993).

In the name of discretion, the SJC's decision implicitly condones actions by government employees which show nothing but contempt for court orders; actions which are hardly in the best interest of the country. Applying the SJC's reasoning in *Poly*, since every discretionary decision of the USAF is grounded in the broad overall policy of acting in the best interest of the United States, every discretionary decision by the USAF will be immune under the DFE. Obviously that does not make sense, nor is it consistent with the SJC's pronouncements in *Stoller* and *Horta*, and it is not the law.

The court's reasoning in those cases provides the foundation for granting a rehearing in *Poly*:

> . . . [T]he *discretionary function exception*, both under our [Massachusetts Tort Claims] Act and under the Federal Tort Claims Act . . . is far narrower, *providing immunity only for discretionary conduct that involves policymaking or planning*. Because of the limitation of the exemption to conduct that is policymaking or planning, the words "discretionary function" are somewhat misleading as a name of the concept.
>
> . . . [T]he dividing line should be between those functions that "rest on the exercise of judgment and discretion and represent planning and policymaking [for which there would be governmental immunity] and those *functions which involve the implementation and execution of such governmental policy or planning [for which there would be no governmental immunity]*." . . . [W]hen the conduct that caused the injury has a "high degree of discretion and judgment involved in weighing alternatives and making

> choices with respect to public policy and planning, governmental entities should remain immune from liability." . . . But, *when* that *conduct* "*involves* rather the *carrying out of previously established policies or plans, such acts should be governed by the established standards of tort liability* applicable to private individuals or entities." . . . *The general rule, however, should be one of governmental tort liability.*
>
> . . . The path of the opinions of the United States Supreme Court concerning the discretionary function exception has been neither straight nor clear. . . . [E]ach case depends on its facts. . . .
>
> . . . The important lesson from the opinions of the Supreme Court is that Governmental *immunity does not result automatically just because the governmental actor had discretion.* [Whether at the policy or planning level or the operational level,] *[d]iscretionary actions and decisions that warrant immunity must be based on considerations of public policy. United States* v. *Gaubert*, ___ U.S. ___, 111 S.Ct. 1267, 1273-74, 113 L.Ed.2d 335 (1991). *Berkovitz* v. *United States*, 486 U.S. 531, 537, 108 S.Ct. 1954, 1959, 100 L.Ed.2d 531 (1988).

Stoller, 412 Mass. at 141-43. (emphasis added).

> Determining whether certain discretionary conduct involves policy making or planning is not a simple task.
>
> . . . *The question* whether a governmental actor's conduct involves discretion of the planning or policy-making type *must be narrowly focused on the allegedly negligent conduct, not on whether the actor's conduct is part of some broader governmental policy.*
>
> . . . .
>
> Indeed, we can presume that all governmental employees, in their official duties, act in furtherance of some governmental policy.

Horta, 418 Mass. at 620-21 and n.12 (emphasis added).

Drawing on the SJC's analysis in *Horta*, we can presume that every action of a USAF official is arguably in furtherance of some governmental policy, including the broad overall policy of acting in the best interest of the country. *See Horta*, 418 Mass. at 621 n.12. If that is all that is required to invoke the DFE, the exception will soon swallow up the FTCA. The real question is, did the specific conduct of the USAF alleged by Plaintiffs to be negligent or wrongful *involve social, political, or economic policy considerations*, and *not just some broader governmental policy* to act in the best interest of the country?

The SJC states in a footnote that *Poly* and *Stoller* are different because in *Stoller* there was a clear policy established and in *Poly* there was none. However, in *Stoller* there was no statute, regulation, or established municipal practice which required firefighters to use sprinklers or hoses. *Stoller*, 412 Mass. at 146. In *Poly*, it was acceptable practice to investigate the validity of court orders, and, if valid, cooperate with civilian authorities. It would be rare for the USAF to knowingly take action which would facilitate a civilian defying probate court orders, kidnapping children and interfering with a constitutional protected right! How is that policy less clear than the policy of *Stoller*? Not only is *Poly* more analogous to *Stoller* than different, but also *Poly* is arguably more compelling a case for government liability than was *Stoller*.

Interestingly, whether the DFE applies to immunize governmental actors who aid in the intentional interference with the constitutionally protected right of a parent to a relationship with his children is not unmapped territory. Federal case law on the subject was brought to the SJC's attention, as well as to the attention of the trial judge. Whereas in *Stoller* the SJC *did* discuss the federal cases regarding government negligence in fighting fires, in *Poly* the SJC does not discuss nor even cite

to the well reasoned opinions in such federal cases as *Franz* and *Ruffalo*, which thoroughly analyze governmental interference with the constitutional right of a parent to a relationship with his children, and conclude that the government's conduct is not immunized from liability by the DFE. *Prisco* v. *Talty*, 993 F.2d 21, 26 n.14 (3rd Cir. 1993).

Where the SJC does not mention Plaintiff's primary theory of the case, nor focus on the true nature of the USAF's negligent or wrongful conduct, does not cite the federal cases on point, relegates the *Stoller* case, containing the SJC's most thorough analysis of the DFE, to footnotes, does not properly apply the case law to the facts in *Poly*, and concludes in favor of the negligent-disbarred attorney rather than reinstate a jury verdict for the Plaintiff father, the SJC's decision cannot stand.

2. *Claim against the Gillises*

Although the trial judge controlled important evidence in order to "influence" the jury to find, as he had, that the 1988 case against the Gillises was "viable," the jury did not find that it was. For the SJC to ignore the jury's finding and to take the side of Moylan, the negligent lawyer, and the trial judge, by concluding that the 1988 Complaint was a viable case when Moylan withdrew in 1992, is unnecessarily reaching.

Due to Moylan's negligence, there is no way that the 1988 case against the Gillises could have been won, because, by law it was barred by the Statute of Limitations. The Statute of Limitations was a defense both because (1) the same claims had been brought and previously dismissed with the 1985 case, and (2) because under G.L. c. 260, § 32, Moylan had only until February, 1987 (1 year after the 1986 dismissal of the 1985 Complaint), to reassert a claim against the Gillises and he did not file the supposedly "viable" second Complaint until 1988.

No matter what part of the 1988 case was left against the Gillises in 1992, the USAF, the most likely source of recovery

for Plaintiffs, was no longer a party to that case. Since, the USA and the Gillises were joint tortfeasors in the 1985 case, Plaintiffs would have been able to recover any judgment against the Gillises from the USA. Plaintiffs did submit evidence of "collectability" against the Gillises in the 1985 case by pointing out to the court the statutory law which provides for recovery of judgments against the USA. There was enough evidence of "collectability" to satisfy the minimum requirement that a Plaintiff show that he could collect "something" on a judgment. Finally, the entire child support system is based on income, and in some cases only attributable income, as "a mere measure of ability to pay without an assessment of debts."

In any event, Poly attempted to have the 1988 case continued without success, and the blame for its subsequent dismissal is properly placed on the withdrawing lawyer, rather than on the client. Several cases stand for the proposition that a lawyer cannot do what Moylan did; be forced to withdraw from a case, and when the case is lost, claim that he did nothing wrong. *Winter* v. *Brown*, 365 A.2d 381 (D.C. App. 1976); *Murphy* v. *Smith*, 411 Mass. 133, 579 N.E.2d 165 (1991).

3. *Misrepresentation and Deceit, Generally*

(a) *Jury instructions, evidence, and award on misrepresentation.*

There was evidence that Moylan's deceit precluded Poly from vacating the dismissal of the 1985 Complaint, which, notwithstanding the DFE, the jury found Poly would have won. Thus, the judge's instructions limiting damages for Moylan's deceit were wrong. Regardless of whether the judge had made up his mind to later rule that because of the DFE, the Complaint against the USAF was unwinnable as a matter of law, correct instructions on damages for deceit, which properly included the loss of the underlying case, should have been given. The opinion glosses over the judge's erroneous instruc-

tions on these damages, and justifies a multitude of legal errors by falling back on the misapprehended proposition that the case against the USAF was unwinnable.

b. *Loss of consortium claims.*

Both Polys went to Moylan for help. It was Moylan's duty to advise both Polys of the causes of action available to them, one of which was a claim for loss of consortium. He breached his duty. Thus, Maureen Poly was not a party to the claim against the USAF and did not appear to be represented by Moylan in the lawsuit. But why reach to find for Moylan, when good practice is to advise a client of any claims that can be brought on behalf of his wife?

c. *Judicial bias.*

It is axiomatic that a different judge, who had not sat on a four (4) weeks long trial and who did not have the benefit of the trial transcript would not conclude on a motion for a new trial that the trial judge, a colleague, denied a party his constitutional right to a fair and impartial trial. To suggest that the different judge's denial of a Motion for a New Trial, containing such an allegation, is any basis to conclude that there was no unfair bias and denial of the constitutional right to a fair trial is a mistake. Even a cursory reading of the trial transcript amply supports Plaintiffs' claim. If every party, under such circumstances, moved for a mistrial, or disqualification or recusal of the judge, most, if not all, of those motions will be routinely denied, potentially exposing the moving party to increase bias and partiality of the judge. Moreover, there are legitimate time and economic concerns which must be considered before deciding to move to disqualify the trial judge and abort a lengthy trial in midstream. On the other hand, if the judge is the type of judge who is going to grant a motion to disqualify himself, more than likely he will also be

the type of judge who will respond properly to rectify the offending behavior when counsel respectfully points out to the judge that the judge is "killing" counsel's client's case. There is always that reasonable expectation and Plaintiff took that reasonable approach in this case, but without success.

4. *Cargill*

The opinion concedes that Cargill was Moylan's employer, but does not address the issues of respondent superior, apparent authority, or the trial judge's manipulation of the evidence which resulted in the jury's finding that Cargill did not have the right to control Moylan. The newly discovered private reprimand requires Moylan's practice of law to be supervised at the Cargill law firm and identifies Cargill as Moylan's employer, despite the Defendant lawyers' misrepresentations throughout the case that Moylan was an independent contractor. The Reprimand emphasizes how unfair the trial judge's manipulation of the employer-employee issue was. Obviously the trial judge who considered Plaintiffs' Motions based on the newly discovered evidence, was not going to agree that the Reprimand invalidated the result which he orchestrated to absolve Cargill. The trial judge's denials of the Motions were pro forma.

5. *Chapter 93A*

Before the trial judge elected to believe Moylan and to find that Moylan had done nothing unfair or deceptive, the trial judge was aware through post-trial pleadings of information consistent with the jury's finding that Moylan had deceived Poly. In 1987, Moylan had stipulated to the BBO that he had:

(1) forged the signature of another attorney to a check and stole money from the other lawyer;

(2) in another matter; he missed the statute of limitations for filing a lawsuit and then kept that from his client;

(a) after missing the statute of limitations, he, nevertheless filed a lawsuit and failed to serve it upon the defendants;

(b) over the next three years, in response to inquiries from his clients about the status of his case, he lied to his client;

(3) in yet another case, in which he had filed a suit on behalf of a different client, he failed to take any further action of record in the case;

(a) for over three years when contacted by the client about the status of his case, he deceived his client;

(b) when the client finally checked the court docket, the client discovered that the complaint Moylan had filed had never been served on the defendants in that case; and

(c) that case was eventually dismissed for lack of prosecution; and

(4) ignored three letters from Bar Counsel, two of which were sent certified mail, return receipt requested (in addition to first class mail), and failed to respond to Bar Counsel's inquiries until he was subpoenaed to the office of Bar Counsel.

Those actions are similar to all of the actions of malpractice and fraud committed by Moylan in the *Poly* case.

Through those same post-trial pleadings, on appeal, the SJC also knew of Moylan's prior disciplinary record. Ironically, Judge Lynch, who wrote the 1996 appellate decision in *Poly*, holding that, despite the jury's verdict finding that Moylan had willfully and knowingly deceived Poly, the trial judge was warranted in ruling that Moylan had not committed any unfair or deceptive act or practice, is the *same* judge who disbarred Moylan in 1995 for negligent, unethical, and fraudulent actions in another case Moylan had handled during the same time frame he was representing Poly, which actions in that other case are also remarkably similar, if not identical, to the negligent, unethical, and fraudulent actions of Moylan that Plaintiffs proved to the jury in their case. For convenience, a copy of the summary of evidence leading to Moylan's disbarment in 1995 is attached.

Although a trial judge's c. 93A findings may differ from a jury's common law finding of fraud, given all of the foregoing, the trial judge's decision and the SJC's opinion are indefensible.

D. *Conclusion*

Based on all of the foregoing, Plaintiffs' Petition For a Rehearing should be granted.

Respectfully submitted,
George P. Poly and Maureen S. Poly
By Plaintiffs' Attorneys
Bernstein & Bell

/s/_____
Ronald I. Bell BBO #036400

/s/_____
Scott A. Bell BBO #628944

cc: Laurence Field, Esq.
Allen N. David, Esq.

Attachment

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-95-021

IN RE: MICHAEL T. MOYLAN

ORDER

This matter came before the Court, Lynch, J., presiding, on an Information filed on March 16, 1995. It is ORDERED that the respondent Michael T. Moylan shall be immediately disbarred from the practice of law in the Commonwealth of Massachusetts and his name is stricken from the roll of attorneys in the Commonwealth of Massachusetts.

It is further ORDERED that Michael T. Moylan shall file with the office of Bar Counsel his affidavit of compliance with S.J.C. Rule 4:01, sec. 17 within thirty days after the effective date of this Order.

By the Court, (Lynch, J.)

/s/_____
Assistant Clerk

Entered: May 22, 1995

20A

IN RE: MICHAEL T. MOYLAN

No. BD-95-021

SUMMARY[1]

On December 30, 1983, a fourteen-year-old boy was injured when the car in which he was a passenger collided with a bus. His father retained counsel to represent the boy's claims against the driver of the car, the bus driver, and the owner of the bus company.

In January 1984, counsel referred the personal injury case to the respondent, with the boy's father's consent. Neither original counsel nor the respondent had an executed contingent fee agreement in compliance with S.J.C. Rule 3:05.

In June 1984, the respondent settled the claim against the driver of the car and the driver's insurance company for $10,000.00. The respondent negotiated a compromise of the medical lien with Blue Cross/Blue Shield for $3,333.34. The respondent told the parents that the remaining money from the settlement would be deposited in an account for the child's benefit pending resolution of the remaining claims.

The respondent did not retain the settlement funds in an account for the child's benefit. Instead, the respondent commingled the funds with his own and converted the funds to his own use.

In December 1986, the respondent filed a civil complaint on behalf of the father and son against the bus company and the driver of the bus. The respondent failed to serve the defendants with the complaint and did no further work on the case. The father made inquiries about the status of the case in 1986

[1] Compiled by the Board of Bar Overseers based on the record submitted to the Supreme Judicial Court.

and 1987, to which the respondent falsely replied that the case was held up by a backlog in the court.

In February 1992, the father asked the respondent for a copy of the complaint and the docket number. The respondent failed to provide this information. In March 1992, the father discovered on his own that the complaint had never been served on the defendants.

In March 1992, the father hired successor counsel and discharged the respondent. The father demanded that the respondent return the file, provide an accounting, and refund the settlement funds. The respondent did not reply to this demand. After subsequent letters from successor counsel to the respondent requesting an accounting and the return of the file, the respondent told successor counsel that he had lost the file. The respondent never provided an accounting for a refund of the settlement funds.

In May 1992, successor counsel served the defendants with the complaint filed by the respondent. Successor counsel asked the respondent to provide information demonstrating there was good cause for the failure to make service. The respondent did not reply to this request. The action was dismissed by the court for failure to effect timely service.

Successor counsel, on behalf of his clients, filed a request for investigation with the Office of Bar Counsel. The respondent failed to cooperate with Bar Counsel's investigation.

The respondent received a private reprimand in 1987 for misconduct arising from three complaints similar to the instant matter. PR-87-23, 5 Mass. Att'y Disc. R. 515.

The respondent's conduct violated Canon One, Disciplinary Rule 1-102(A)(4) and (5) (prohibiting conduct involving dishonesty, deceit and misrepresentation and conduct prejudicial to the administration of justice); Canon Two, Disciplinary Rule 2-106(C) (lawyer shall not enter in an arrangement for or charge a contingent fee without a written contingent fee agree-

ment) and Disciplinary Rule 2-110(A)(2) (discharged lawyer shall deliver to the client all papers and property to which the client is entitled); Canon Six, Disciplinary Rule 6-101(A)(3) (lawyer shall not neglect a legal matter); Canon Seven, Disciplinary Rules 7-101(A)(1), (2) and (3) (failure to represent a client zealously, failure to carry out contract of employment, and prejudicing client during course of employment); Canon Nine, Disciplinary Rule 9-102(A) and (B) (failure to preserve identity of funds and property of client, failure to place in safekeeping client's property, failure to render accounts to client and failure to turn over to client his property); and SJC Rule 4:01 § 3 (lawyer required to respond to Bar Counsel's requests for information during course of investigation).

The hearing committee, the appeal panel, and the Board of Bar Overseers recommend disbarment. The Board of Bar Overseers filed an information recommending disbarment on March 15, 1995. On May 22, 1995, following argument by the parties, the Supreme Judicial Court for Suffolk County entered an order disbarring the respondent from the practice of law.

APPENDIX C

Supreme Judicial Court
for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Ronald I. Bell, Esquire
Bernstein & Bell
4 Courthouse Lane
Chelmsford, MA 01824

RE: No. SJC-07009
GEORGE POLY & another
vs.
MICHAEL T. MOYLAN & others

NOTICE OF DECISION

Enclosed please find a copy of the decision rendered by the court in the above-captioned case.

Very truly yours,

/s/_____
Jean M. Kennett, Clerk

Dated: July 11, 1996

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court for the Commonwealth

at Boston, JULY 11, 1996

IN THE CASE NO. SJC-07009

GEORGE P. POLY

vs.

MICHAEL T. MOYLAN & others.

pending in the Superior Court Department of the Trial Court for the County of Essex, No. 91-2299.

ORDERED, that the following entry be made in the docket; viz., —

The judgment notwithstanding the verdict on the malpractice claim is affirmed. The damages under the deceit claim are vacated, and the denial of damages under G.L. c. 93A is affirmed.

BY THE COURT,

/s/_____, CLERK.

July 11, 1996
SEE OPINION ON FILE.

SJC-07009

GEORGE P. POLY & another[1] *vs.* MICHAEL T. MOYLAN & others.[2]

Essex. March 4, 1996. – July 11, 1996.

Present: Liacos, C.J., Wilkins, Abrams, Lynch & Greaney, JJ.

Practice, Civil, Judgment notwithstanding verdict, Judicial discretion, New trial. *Attorney at Law*, Malpractice, Negligence. *Federal Tort Claims Act. Deceit. Negligence, Causing loss of consortium. Jury and Jurors. Constitutional Law*, Fair trial. *Consumer Protection Act*, Unfair or deceptive act.

Civil action commenced in the Superior Court Department on July 18, 1991.

The case was tried before *John P. Forte*, J., sitting under statutory authority, and an amended motion for a new trial was heard by *Joseph A. Grasso, Jr.*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Ronald I. Bell (*Scott A. Bell* with him) for the plaintiffs.

Allen N. David (*Harvey Weiner* with him) for Michael T. Moylan.

Laurence Field for Thomas E. Cargill, Jr.

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[1] Maureen S. Poly. When we refer to a single plaintiff, we mean the principal plaintiff, George P. Poly.

[2] Thomas E. Cargill, Jr., and Cargill Associates.

LYNCH, J. This appeal arises in an action by George P. Poly (plaintiff) and Maureen S. Poly (plaintiff's wife) against the defendants because of their alleged improper handling of a prior action against the United States Air Force (USAF), the plaintiff's former wife, Janet C. Gillis, and her husband, Air Force Sergeant Earl J. Gillis. On appeal the plaintiff argues that: (1) the trial judge erred in allowing the defendants' motion for judgment notwithstanding the verdict; (2) the judge erred in ruling that the USAF would not have been liable in the underlying tort claim; (3) the judge's biased conduct violated the plaintiff's right to a fair and impartial trial; (4) he is entitled to a new trial because a newly discovered private reprimand by the Board of Bar Overseers confirms an employee relationship between Moylan and Cargill; and (5) the judge erroneously decided that the defendants had no liability under G.L. c. 93A (1994 ed.).

1. *Procedural History*. The plaintiff filed this action against his former lawyer, Michael T. Moylan, and Moylan's employer during part of the period at issue, Thomas E. Cargill, Jr., and Cargill Associates. The complaint argued: (1) negligence and breach of contract; (2) misrepresentation and deceit; (3) unfair or deceptive acts or practices under G.L. c. 93A; and (4) the plaintiff's wife's claimed loss of consortium.

The case, except for the G.L. c. 93A count, was then tried before a jury, resulting in a verdict for the plaintiff. In response to special questions, the jury found that Moylan had been negligent, and had misrepresented material facts to the plaintiff, and that the plaintiff would have prevailed both against the Gillises and the USAF. The jury also found that Cargill did not have control over Moylan in regard to the plaintiff's case and that the plaintiff's wife suffered no loss of consortium. The judge found that neither defendant had committed any unfair or deceptive act, and therefore dismissed the G.L. c. 93A claim and awarded both defendants their costs.

He then allowed Moylan's motion for judgment notwithstanding the verdict on the malpractice count; reduced the damages from $10,000 to $295 on the misrepresentation and deceit count; and denied the plaintiff's motion for a new trial on the G.L. c. 93A count. Another Superior Court judge denied the plaintiffs' motion for a new trial on the malpractice, misrepresentation and deceit counts. The plaintiffs and Moylan cross appealed. We granted the plaintiffs' application for direct appellate review.

2. *The underlying tort claims.* We summarize the evidence in the light most favorable to the plaintiff. As a result of a divorce, Janet Gillis, the plaintiff's former wife, was awarded custody of their two sons with the plaintiff having visitation rights. In 1979, Sgt. Earl Gillis, her then husband, was reassigned from Pease Air Force Base in New Hampshire to Ramstein Air Force Base in Germany. The USAF allowed Janet Gillis and the children to join Sgt. Gillis in Germany.

On April 9, 1979, the plaintiff had obtained an order in the Middlesex Probate Court prohibiting Janet Gillis from removing the children from their home in Lee, New Hampshire. On April 13, 1979, the plaintiff sought and obtained a temporary custody order. The plaintiff then went to Lee and Pease Air Force Base in an unsuccessful attempt to find Janet Gillis and the children. At Pease Air Force Base, the plaintiff presented a copy of the temporary custody order to a USAF officer in the Judge Advocate General's Corps. On April 18, 1979, the plaintiff provided the USAF with another copy of the custody order.

On October 31, 1979, the Probate Court awarded permanent custody of the boys to the plaintiff. In 1980, criminal arrest warrants for kidnapping were issued against the Gillises. The USAF was notified of these warrants.

In May, 1983, and May, 1985, the USAF approved Sgt. Gillis's request to extend his tour of duty in Germany. In July,

1987, after the Gillises returned with the children to the United States they were found guilty of kidnapping under G.L. c. 265, § 26A (1994 ed.), and fined $2,550. Janet Gillis was found in contempt of the October 31, 1979, judgment and fined $500.

While the Gillises were in Germany with the boys in middle to late 1984, the plaintiff engaged Moylan. In January, 1985, Moylan presented an administrative claim to the USAF under the Federal Tort Claims Act (FTCA). The USAF denied the claim, contending that all acts allegedly committed by its personnel took place in Germany and that the FTCA did not apply under the foreign country exception.

In July, 1985, Moylan filed a complaint against the Gillises and the USAF in the United States District Court. Despite the USAF's prior successful invocation of the FTCA's foreign country exception, Moylan did not draft the complaint to emphasize the actions of USAF personnel in the United States.

In January, 1986, the USAF moved to dismiss on the basis of the foreign country exception. Moylan did not discuss the motion to dismiss with the plaintiff, and unilaterally decided not to oppose it. The United States District Court dismissed the plaintiff's claim against the USAF, noting that no exception had been submitted and that all of the actions by the United States that formed the basis of this complaint occurred in a foreign country.

Moylan had not served the complaint on the Gillises for over 120 days. As a result, the United States District Court ordered Moylan to show cause why service had not been made. At the show cause hearing, Moylan failed to recognize or to argue that Fed. R. Civ. P. 4(m) (1995) provides more than 120 days for service on defendants outside of the United States. The District Court dismissed the complaint against the Gillises on February 26, 1986. Subsequent to the dismissal, Moylan learned that service had been properly made, but did not move to vacate the dismissal.

In 1988, Moylan filed a second complaint against a USAF official and the Gillises, this time in the Superior Court, alleging intentional infliction of emotional distress and a violation of the Massachusetts Civil Rights Act (G.L. c. 12, § 11I [1994 ed.]).[3] This second complaint was dismissed against the government (as substituted defendant) on the ground that the statute of limitations had expired.

Moylan failed to inform the plaintiff that his action in the United States District Court had been dismissed, and that the action in the Superior Court had also been dismissed against the government. He also failed to answer the plaintiff's questions, never sent documents relative to the status of the case, and avoided the plaintiff's calls. The plaintiff did not learn about the two dismissals until 1991. Moylan also failed to inform the plaintiff that he had decided to stop using an investigator in the case.

After the plaintiff sued Moylan in July, 1991, Moylan moved to withdraw from the case against the Gillises in the Superior Court. This motion was allowed in March, 1992. Moylan conducted no discovery in either case. The Superior Court case was finally dismissed by November, 1993.

3. *Count I: legal malpractice.* In view of the allowance of Moylan's motion for judgment notwithstanding the verdict, we inquire whether, on any reasonable view of the evidence, there is a combination of facts from which a rational inference may be drawn in the plaintiff's favor. *Sullivan* v. *Brookline*, 416 Mass. 825, 826 (1994), and cases cited.

In a legal malpractice action a plaintiff who alleges his attorney was negligent in the prosecution of a claim will prevail if he proves that he probably would have obtained a better result had the attorney exercised adequate skill and care. *Fish-*

[3] The plaintiff characterizes the second lawsuit as having been frivolously brought by Moylan, as the statute of limitations had run and insufficient facts were alleged to support a civil rights violation.

man v. *Brooks*, 396 Mass. 643, 647 (1986). "[F]ormer clients suffer a loss due to an attorney's negligence only if that negligence is shown to have made a difference to the client." *Jernigan* v. *Giard*, 398 Mass. 721, 723 (1986).

(a) *The case against the USAF and the discretionary function exception.* The defendants argue that the cases against the USAF could not have been won because the claim was barred by: (1) the discretionary function exception to the FTCA; (2) the foreign country exception to the FTCA; (3) the fact that Moylan was not retained until the statute of limitations had run; and (4) insufficient evidence of intent. We agree with the defendants that the claim was barred by the discretionary function exception to the FTCA. We do not reach the other arguments.

The discretionary function exception of the FTCA prohibits recovery where the alleged tort is "based upon the exercise or performance or the failure to excercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1994).

Whether conduct falls under the discretionary function exception is a question of law. *See Hart* v. *United States*, 894 F.2d 1539, 1544 (11th Cir.), *cert. denied*, 498 U.S. 980 (1990); *Garcia* v. *United States*, 826 F.2d 806, 809 (9th Cir. 1987).[4] The United States Supreme Court has provided a two-step test for applying the discretionary function exception. *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988).[5] The court must first determine whether the governmental actor had

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[4] The plaintiff argues that the judge in instructing the jury erred in placing the burden on the plaintiff to show that the discretionary function exception did not apply. As the jury found for the plaintiff on this issue, any error was harmless.

[5] As we have concluded that the discretionary function exception to the Massachusetts Torts Claims Act, G.L. c. 258, § 10(*b*) (1994 ed.), is guided by the same exception in the FTCA, our analysis of cases applying Massachusetts law are also relevant. *Harry Stoller & Co.* v. *Lowell*, 412 Mass. 139, 142-43 (1992).

discretion to decide which course to follow and, if so, whether the exercise of that discretion involves policy making or planning. *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991).

Federal law at the time at issue did not obligate the USAF to return enlisted personnel from overseas because of court orders or even criminal warrants. 10 U.S.C. § 814 (the military may or may not deliver members for trial). A member of the armed forces stationed abroad and accused of an offense by civil authority may be delivered, on request, to the civil authority for trial. *See* 32 C.F.R. § 884.3; 32 C.F.R. § 884.4(d). This is "permissive only." *Jennings* v. *Markley*, 186 F.Supp. 611, 613 (S.D. Ind. 1960), *aff'd*, 290 F.2d 892 (7th Cir. 1961). Therefore, the USAF had discretion to return the Gillises to the United States.

It is more difficult to determine whether that discretionary conduct involves policy making or planning. *Harry Stoller & Co.* v. *Lowell*, 412 Mass. 139, 141 (1992), discussing *Berkovitz* v. *United States*, *supra*. The plaintiff's military witness testified that, in making the decision on a request to return military personnel, the overall USAF policy was to act in the best interest of the country and the USAF.[6] Whether an act is in the best interests of the United States is a matter of policy.[7] The decision of the USAF, therefore, was grounded in policy as required by the second part of the discretionary function exception.

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[6] There was also evidence offered by the defendants that the USAF had a clear policy of neutrality with regard to child custody disputes. We disregard the neutrality issue and focus on the undisputed policy that all discretionary decisions were to be made in the best interests of the United States and the USAF.

[7] Regulations issued subsequent to this case indicate that now the official policy is that in a parental kidnapping case, the USAF is to encourage their military personnel to cooperate with civil authorities and then possibly withdraw command sponsorship. 32 C.F.R. § 884.5 (1995). There is no requirement for either of those actions. The plaintiffs cite to *Harry Stoller & Co.* v. *Lowell*, *supra* at 141, for the proposition that, when conduct involves carrying out previously established policies or plans, then the governmental entities should not be immune. Since there was no clear policy established, this case does not apply.

As the Supreme Court has stated:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to excercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. . . . The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

United States v. *Gaubert*, *supra* at 324-25. Because operational decisions are included within the discretionary function exception, *id.* at 334, even the initial act of permitting Sgt. Gillis to leave this country with his wife's children falls within the exception. The judge acted properly in allowing the defendants' motion for judgment notwithstanding the verdict on the claim asserted against the USAF.

(b) *The plaintiff's claim against the Gillises.* The judge entered judgment for Moylan and Cargill notwithstanding the verdict first, because the plaintiff did not submit any evidence of the collectability of a judgment against the Gillises; and, second, because the plaintiff knew that Moylan had withdrawn from the Superior Court case while there was still a viable claim.

A plaintiff in a legal malpractice action asserting negligence in the handling of his claim in the underlying action bears the burden of showing that he would have been able to collect on the judgment obtained in the underlying case. *Jernigan* v. *Giard*, 398 Mass. 721, 723 (1986). He may only collect from the defendant lawyer what he could have collected from the defendant in the underlying act, but for the attorney's negligence. *Id. See also* Barry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 Mass. L. Rev. 74, 81 (1993).

Although there was evidence that Sgt. Gillis was employed by the USAF at the time, there was no evidence on the state of his finances. He could have had secured obligations equal to or in excess of his income as a USAF Sergeant. Income is not a measure of ability to pay without an assessment of debts. Many, if not most, insolvents have some income. There was no evidence whatsoever pertaining to the income or financial condition of Janet Gillis. The plaintiff failed to sustain his burden of proving the collectability of the judgment against the Gillises.

Moylan withdrew with court approval from the action pending in the Superior Court on March 25, 1992. The claim was not dismissed against Janet Gillis until August, 1992, and was not dismissed against her husband until November 2, 1993. Therefore, when Moylan withdrew from the case with court permission after notice to the plaintiff, there was still a viable case pending against the Gillises and it was still possible to proceed with discovery and investigation. There was no evidence of damage occurring to the plaintiff as a result of Moylan's conduct in that action up to the time of his withdrawal.

4. *Misrepresentation and deceit.* The plaintiff argues that the judge erroneously limited evidence of damages resulting from Moylan's misrepresentation or deceit, gave incorrect jury instructions on damages, and erroneously reduced the damages awarded by the jury.

(a) *Jury instructions, evidence, and award on misrepresentation.* The jury found that the plaintiff sustained damages of $10,000 as a result of Moylan's misrepresentation. The judge reduced the damages award to $295, ruling that the plaintiff could only recover his out-of-pocket expenses which the judge found to be filing fees paid on the Federal case.

The jury could have found that Moylan failed to tell the plaintiff that his Federal District Court action against the USAF and the Gillises had been dismissed on February 26, 1986. The

jury could have also found that Moylan did not inform the plaintiff of his decision to stop using an investigator to interview witnesses and gather evidence after October, 1988. There was no evidence that Moylan's deceit caused the dismissal of the Federal action. Therefore, the filing fee did not relate to the alleged deceitful acts. Proof of damages flowing from misrepresentations is essential to recovery. *Cardullo* v. *Landau*, 329 Mass. 5, 7 (1952). "Where a plaintiff does not prove that he is worse off than if there had been no misrepresentation he has not made out a case of deceit." *Connelly* v. *Bartlett*, 286 Mass. 311, 315 (1934).

The only other evidence of direct damage incurred by the plaintiff was that he spent about $10,000 from 1979 to 1987 in his attempt to get his children back. However, this evidence was restricted without objection to apply only to the underlying claim against the USAF. Because we conclude that the claim against the USAF could not have been won, there could be no damages arising from any misrepresentations concerning its dismissal.

For this same reason the plaintiff cannot succeed in his argument that the judge erroneously excluded correspondence, newspaper articles, and testimony which supported his allegation that Moylan never told him that the Federal case against the USAF had been dismissed.

(b) *Loss of consortium claims*. The jury concluded that the plaintiff's wife did not suffer a loss of consortium related to the defendants' negligence. Therefore, no damage could arise from Moylan's conduct in regard to the loss of consortium claim. Furthermore, the argument that Moylan was negligent in failing to bring a loss of consortium claim on behalf of the plaintiff's wife in the underlying claim was not properly presented as a theory of recovery at trial. An appeal is not the proper time to advance new theories of recovery. *See Commonwealth* v. *George*, 406 Mass. 635, 636 n.4 (1990).

Finally, because the plaintiff's wife was not a party to the underlying tort action and was not a client of Moylan, he could not be liable for her loss of consortium claim.

(c) *Judicial bias generally.* The plaintiff claims that the judge was unfairly biased against him from the beginning, thus violating his constitutional right to a fair and impartial jury trial. The motion judge, who was not the trial judge, denied the plaintiff's motion for a new trial on this ground. We will not reverse the lower court's denial of a new trial motion absent an error of law or abuse of discretion. *Robertson* v. *Gaston Snow & Ely Bartlett*, 404 Mass. 515, 520-21, *cert. denied*, 493 U.S. 894 (1989). There was no such error or abuse.

During the trial, the plaintiff did not object or move for a mistrial on the ground of judicial bias, nor did he move for disqualification or recusal of the judge. Although this does not necessarily mean there was no bias, we do take this into consideration when viewing the record. *Commonwealth* v. *Fitzgerald*, 380 Mass. 840, 846 (1980). In addition, the plaintiff on appeal has failed to point out in any concrete way how the judge's conduct might have harmed him apart from the judge's decisions already discussed. *See Commonwealth* v. *Armand*, 411 Mass. 167, 171 (1991).

5. *Case against Cargill.* The jury concluded that Cargill did not have the right to exercise control over Moylan's handling of the plaintiff's case after January, 1986.[8] There was more than adequate evidence to support this finding, and the plaintiff does not argue otherwise. He argues instead that he is entitled to a new trial because of new evidence, namely a private reprimand issue in 1987 by the Board of Bar Overseers regarding a case handled by Moylan in 1982 and 1983 before his affiliation with Cargill following which an employee of Cargill acted as a monitor of Moylan's practice. The judge denied this motion.

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[8] The date when Moylan became an associate of Cargill.

A motion for a new trial is addressed to the sound discretion of the judge. *Robertson* v. *Gaston Snow & Ely Bartlett, supra* at 520. The reprimand makes no mention of Cargill and does not suggest he had the right to control Moylan's actions in the underlying action. There was no abuse of discretion.

6. *General Laws c. 93A.* In a separate bench trial, the judge concluded that the defendants' actions or omissions did not constitute unfair or deceptive acts or practices in violation of G.L. c. 93A. The plaintiffs moved for a new trial which was denied. We review to determine whether this denial was an abuse of discretion. The judge found that:

> even if [Moylan] was negligent in his research (not noting that [USAF] personnel assignments required approval by a Texas command), this does not give rise to a G.L. c. 93A violation nor did this result in a deceptive act. Further, [Moylan's] quote of a normal contingent fee of 1/3 of recovery before he knew a suit would be commenced under the FTCA, which permits only a 25% fee, did not amount to an unfair or deceptive act or practice especially when no fee was ever charged or paid. In addition, I find at no time did Moylan deceive Poly. That although the defendant was negligent, he did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

"[A] judge may make independent and, therefore, different, findings on the c. 93A aspect of a case that arises from the same facts which gave rise to parallel common law claims." *Wyler* v. *Bonnell Motors, Inc.*, 35 Mass. App. Ct. 563, 567 (1993). The evidence adequately supports the judge's findings. There was no abuse of discretion.

Conclusion. The judgment notwithstanding the verdict on the malpractice claim is affirmed. The damages under the deceit claim are vacated, and the denial of damages under G.L. c. 93A is affirmed.

So ordered.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

Essex, ss. Superior Court
Civ. #91-2299

George P. Poly and Maureen S. Poly

v.

Cargill & Associates
Thomas E. Cargill and
Michael T. Moylan

RULING ON MOYLAN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICTS

On a defendant's motion for judgment notwithstanding a verdict, the judge is to consider whether any evidence, considered in the light most favorable to the plaintiff, permits a reasonable inference in favor of the plaintiff on the count on which the jury returned a verdict favorable to the plaintiff. *Forlano* v. *Hughes*, 393 Mass. 502, 504 (1984); *O'Shaughnessy* v. *Besse*, 7 Mass. App. Ct. 727, 728-29 (1979); *Conway* v. *Sterling*, 37 Mass. App. Ct. 1 (1994). "Conflicting evidence alone does not justify judgment notwithstanding the verdict . . . '[I]t is of no avail for the defendant to argue that there was some or even much evidence which would have warranted a contrary finding by the jury' . . . the court may not substitute its judgment of the facts for that of the jury." *Tosti* v. *Ayik*, 394 Mass. 482, 494 (1985).

I. *Count 1: Legal Malpractice*

In order for a recovery on this count, the plaintiff had the burden of proving "that he probably would have obtained a better result had the attorney exercised adequate skill and care" in the underlying case. *Fishman* v. *Brooks*, 396 Mass. 643, 647 (1986).

Re: Poly v. U.S. Air Force

The action against the Air Force was based on the Federal Torts Claims Act, 28 U.S.C. § 2671 *et sequi* (1970) (FTCA). The basic allegations were:

(a) transferring Sgt. Gillis from Pease Air Force Base in New Hampshire to Ramstein Air Base, Germany,
(b) approving "command sponsorship" for Mrs. Gillis (Poly's former wife) and her two sons from the Poly marriage, which permitted Mrs. Gillis and the sons to join Sgt. Gillis in Germany,
(c) extending Sgt. Gillis's tour of duty in Germany until after the older son attained majority, and
(d) not causing Sgt. Gillis and/or Mrs. Gillis and/or the two sons to return to Massachusetts after Massachusetts arrest warrants were issued for the arrest of Sgt. Gillis and Mrs. Gillis for kidnapping and/or for not honoring the Massachusetts Probate Court order granting custody of the two sons to Poly.

There was no evidence as to the date the Air Force decisions were made as to (a) and (b) above.

Although the action commenced by Moylan in the Federal District Court, docket #85-2907MA, was dismissed on the Government's motion without opposition by Mazone, J. with the following notation "all the acts by the United States which form the basis of this complaint took place in a foreign country

and this complaint is excluded under the Federal Torts Claims Act by 28 U.S.C., § 2860(k)," there were other valid defenses that would have prevented Poly from prevailing in the law suit.

The FTCA, 28 U.S.C. § 2401(b), requires as a condition precedent to a law suit, that a presentment be made within two years after such claim accrues. Sgt. Gillis's transfer to Germany occurred in 1979, the same year Mrs. Gillis and the two sons joined her husband under "command sponsorship." Poly knew the whereabouts of his sons no later than September, 1979 (Ex. 44). By May 1981 Poly had come to the conclusion that the Air Force was aiding in violating his rights and that the Gillises were using the Air Force to shield themselves from prosecution (Ex. 46). "A cause of action will accrue when the plaintiff actually knows of the cause of action or when the plaintiff should have known of the cause of action." *Riley* v. *Presnell*, 409 Mass. 239, 244 (1991). If facts are in dispute, the question when a cause of action accrues is for the jury. If the facts are not in dispute, it is an issue of law. By the time Poly met Moylan in 1984 no presentment had been made in behalf of Poly.

The FTCA § 2680(a) contains an express exemption to governmental liability for "any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the government. . .". Whether an act is a discretionary function is not a question of fact but a matter of law for the court. "[B]oth Federal and State cases hold that the application of the discretionary function exception is a question of law for the court. *Hart* v. *United States*, 894 F.2d 1539, 1544 (11th Cir.), *cert. denied*, 498 U.S. 980 (1990); *Garcia* v. *United States*, 826 F.2d 806, 809 (9th Cir. 1987) . . ." *Alter* v. *City of*

Newton, 35 Mass. App. Ct. 142, 148 (1993). Even decisions made at the operational level, as opposed to those made at the policy or planning level, would involve conduct immunized by the discretionary function exemption if the conduct were the result of policy determinations. *United States* v. *Gaubert*, 499 U.S. 315 (1991). *Stoller* v. *City of Lowell*, 412 Mass. 139, 141 (1992). "An agency may rely on internal guidelines rather than on published regulations." *U.S.* v. *Gaubert*, *supra* at 324. A plaintiff has the burden of proving a properly invoked exemption does not apply. *Hydrogen Tech Corp.* v. *United States*, 831 F.3d 1155, 1162 n.6 (1st Cir. 1987), *cert. denied*, 406 U.S. 1022 (1988). Both experts, Air Force Lt. Gen. Stansberry for the plaintiff and Ms. Keesling (former Assistant Secretary of the Air Force) for the defendant, testified that decisions regarding assignments and "command sponsorship" were discretionary functions. There was no conflicting testimony on this issue.

I rule that the assignment of Sgt. Gillis to Germany, the approval of "command sponsorship" and the extensions of Sgt. Gillis's tours of duty were discretionary functions by the Air Force and thus the Air Force was exempt from liability under the FTCA. *See Burns* v. *United States*, 618 F.Supp. 882 (D.Mass. 1985).

In addition, the evidence introduced indicated that in custody matters, neutrality was the official Air Force policy. (Ex. 13, 16, 18, 68). In carrying out official policy the Air Force is exempt from liability under the FTCA.

The Air Force was not obligated to return enlisted personnel from overseas because of court orders or criminal warrants. By statute, the military may or may not deliver members for trial. 10 U.S.C. § 814. Regulations in effect from 1979 through 1987 allowed the Air Force to refuse to deliver an airman for trial even on an aggravated felony if the airman was stationed overseas. 32 C.F.R. § 884.4(d) (1964). Under regulations as

prescribed by the Secretary, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial. This is "permissive only." *Jennings* v. *Markley*, 186 F.Supp. 611 (S.D. Ind. 1960).

Operating Instructions dated May 16, 1983 from the Office of the Judge Advocate General (Ex. 71) state that requests for the return of an overseas airman will be reviewed by HQ USA/JAJ to determine the best interests of the Air Force. Although there were arrest warrants outstanding there was no evidence introduced that an attempt to have either of the Gillises extradited from Germany. *See* Ex. 20.

In regard to the Military Claims Act, 10 U.S.C. § 2733, Moylan did appeal the Air Force's disallowance of relief under this act. The appeal was denied which was final and conclusive, there being no court review. *Rodrigue* v. *United States*, 968 F.2d 1430 (1st Cir. 1992); *Broadnax* v. *United States*, 710 F.2d 865 (D.C. Cir. 1983). Therefore, Poly would not have prevailed in his underlying action against the Air Force.

Re: Poly v. *Sgt. Gillis and Mrs. Gillis*

Although Federal District Court action #85-2907MA was dismissed on February 28, 1986 as to the Gillises, Moylan on May 11, 1988 refiled the Poly's claim against the Gillises in Suffolk Superior Court, Civ. #88-2726 (Ex. 37 and Ex. 48) and when Moylan withdrew, with the Superior Court's permission, on March 25, 1992 (Ex. 37) his appearance in behalf of Poly (as a result of this suit), the action was still pending. Said action was not dismissed until November 2, 1993, over 17 months after Moylan's withdrawal.

Therefore, Poly could not prove that "he probably would have obtained a better result had the attorney exercised adequate skill and care." *See Fishman* v. *Brooks*, 396 Mass. 643 (1986).

In addition, for a plaintiff to recover in a legal malpractice action, he has the burden of showing that a judgment in his favor

would have been collectible to some degree. *Jernigan* v. *Giard*, 398 Mass. 721, 723 (1986). There was no evidence introduced as to the Gillis's finances once they returned to the United States.

Therefore, in regard to Count 1 (legal malpractice) the defendant's motion for judgment N.O.V. is allowed.

II. *Count 2 - Deceit*

The jury found that Moylan was liable for deceit. There was testimony that Poly "spent" about $10,000 from 1979 on without specifics in his attempt to get back his children. There was no evidence introduced that any of this was caused by any misrepresentation or any statement by Moylan except $295.00 Poly advanced for the entry fee for Fed.Dist.Ct. docket #85-2907MA. Only those losses directly resulting from, *Alpine* v. *Friend Bros, Inc.*, 244 Mass. 164, 167 (1923) or which were a foreseeable consequence of the deceit, *Kohl* v. *Silver Lake Motors*, 369 Mass. 795 (1976), should be recoverable. To recover the loss-of-the-bargain, the misrepresentation must amount to a warranty. No misrepresentation evidence was introduced that amounted to a warranty. Therefore, Poly is limited to his out-of-pocket expenses resulting from Moylan's statements, to wit: $295.00. *See Rice* v. *Price*, 340 Mass. 502 (1960).

Therefore, the defendant's motion for judgment N.O.V. as to Count 2 (deceit) is denied. However, the damages awarded are reduced to $295.00

CONCLUSION:

As to Count 1: Judgment for Poly is vacated and judgment shall enter for Moylan.

As to Count 2: Judgment for Poly in the amount of $10,000 is vacated and judgment for Poly shall issue in the amount of $295.00.

/s/_____
John P. Forte
Justice

July 23, 1994